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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 298

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Petitioners,

v.

THE ANACONDA COMPANY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit.

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In the Supreme Court of the United States

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v.

THE ANACONDA COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit.

Petitioners herein are the Brotherhood of Locomotive Firemen and Enginemen; Frank W. Glass, individually and as vice president of the Brotherhood of Locomotive Firemen and Enginemen; J. H. McCarvel, individually and as general chairman of the Brotherhood of Locomotive Firemen and Enginemen; Brotherhood of Railroad Trainmen; H. E. Nevala, individually and as deputy president of the Brotherhood of Railroad Trainmen; and R. R. McLean, individually and as general chairman of the Brotherhood of Railroad Trainmen.

The respondents herein are The Anaconda Company; Butte Miners' Union No. 1 of the International Union of Mine Mill and Smelter Workers; International Union of Mine Mill and Smelter Workers; and John B. McClernan, Judge of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow.

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on May 18, 1959, which gment denied a petition for a writ of prohibition.

CITATIONS TO OPINIONS BELOW

The Court of Appeals did not render an opinion in connection with its judgment denying the petition for a writ of prohibition. The writ of prohibition was sought for the purpose of protecting the appellate jurisdiction of the Court of Appeals and the subsequent enforcement of its decision, if favorable to these petitioners, in cause No. 16,372. The Court of Appeals rendered an opinion in cause No. 16,372, affirming the judgment of the District Court in favor of these petitioners, on May 18, 1959. The opinion of the Court of Appeals is printed in the Appendix hereto, *infra*, pp. 19-31.

The opinion of the District Court is reported in 168 F. Supp. 911, and is printed herein, together with the District Court's Findings of Fact and Conclusions of Law, in the Appendix hereto, *infra*, at pp. 32-48.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

The question presented is whether, in the exercise of a sound judicial discretion, the Court of Appeals for the Ninth Circuit should have issued, at the request of the petitioners herein, a writ of prohibition to a Montana state court to prevent that court from enforcing a temporary injunction against The Anaconda Company, or making such injunction permanent, when the effect of such injunction would be to prevent The Anaconda Company from complying with a decision by the Court of Appeals for the Ninth Circuit, thereby nullifying important rights accorded by the Railway Labor Act to railway employees represented by the petitioners herein.

STATUTES INVOLVED

The statutory provisions involved are the All Writs Act, 62 Stat. 944, amended 63 Stat. 102, 28 U. S. C. Sec. 1651; and parts of Sections 2, 5 and 6 of the Railway Labor Act (45 U. S. C. Secs. 152, First, Second, and Seventh; Section 155, First (a) and (b), and Section 156). These statutes are printed in the Appendix hereto, *infra*, pp. 49-51.

STATEMENT

This litigation began March 13, 1958, with the filing of a complaint by the Butte, Anaconda & Pacific Railway Company (hereinafter referred to as the "BA&P" or "BA&P Railway") in a state court located at Butte, Montana, against the Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, and certain of their officers. A temporary restraining order was issued by the state court on March 13, 1958, the Honorable John B. McClernan sitting as Judge, which order

prohibited the BA&P's employees, and the Brotherhoods (petitioners herein) as their craft representatives, from leaving their employment to strike. The dispute that caused the employees to decide to strike originated in the following manner:

The BA&P Railway is a wholly owned subsidiary of The Anaconda Company. The principal officers of BA&P Railway are also the principal officers of The Anaconda Company. A major transportation service rendered by the BA&P Railway is the movement of ore trains from The Anaconda Company's copper mine at Butte, known as Berkeley Pit, to the smelting plants operated by The Anaconda Company at Anaconda, Montana, a distance of about 26 miles. The BA&P also renders a common carrier service to a few industries along its line of track. It is engaged in interstate commerce and is subject to the Railway Labor Act.

The Brotherhood of Locomotive Firemen and Enginemen represents, for the purposes of the Railway Labor Act, the crafts of engineers and firemen employed on the BA&P Railway. The Brotherhood of Railroad Trainmen similarly represents the trainmen and switchmen crafts employed by the BA&P Railway. Collective agreements negotiated by the two Brotherhoods with the BA&P Railway provide that a switching crew shall consist of five employees, to wit, an engineer, a fireman, a conductor, and two brakemen.

During a period of two years or more before this litigation began, the work of switching and loading freight cars with ore taken from the Berkeley Pit, and combining these cars into trains, was performed by BA&P employees in a yard adjacent to the Berkeley Pit known as the Old Berkeley Yard. During 1957 and early 1958 the BA&P

Railway built for The Anaconda Company a new loading and switching yard some 3,000 feet distant from the old yard. The work of loading and switching ore cars was transferred to the New Berkeley Yard on March 14, 1958.

Late in 1957 the BA&P Railway served two Section 6 notices (45 U. S. C. Sec. 156) on the two Brotherhoods. These notices were requests that the two Brotherhoods agree to certain changes in the terms of their collective agreements. The change requested by one notice was that *road crews* be used to perform the switching work in the New Berkeley Yard when the latter was ready to be put into operation. The change requested by the second notice was that the switching work performed in the New Berkeley Yard be performed by a reduced crew consisting of an engineer, an engine foreman, and a helper.

A conference was held on the Section 6 notices on October 10, 1957, at which time the Brotherhood officers were informed that if they would agree to the proposed contract changes, BA&P employees would be allowed to continue loading and switching the ore cars when the work was transferred to the New Berkeley Yard. The Brotherhoods' officers initially declined to agree to the proposed contract changes. Thereafter, on October 25, 1957, the Brotherhoods invoked the mediatory services of the National Mediation Board. A mediator was assigned, and a conference under the sponsorship of the mediator was held on January 15, 1958. The Brotherhoods' officers attending the conference again declined to agree to the proposed contract changes, whereupon they were informed that the loading and switching work would be taken from the BA&P employees when the New Berkeley Yard was put into operation and would thereafter be performed by Anaconda employees. On January 17, 1958, BA&P noti-

fied the Brotherhoods that it was withdrawing the Section 6 notices and that in consequence of this withdrawal it considered mediation as ended. Nevertheless, at the request of the Brotherhoods, the National Mediation Board continued its efforts at mediation and requested BA&P to maintain the status quo by continuing to use BA&P crews to do the work of loading and switching Anaconda ore cars. In a letter dated March 7, 1958, BA&P advised the Brotherhoods that on and after March 14, 1958, the loading and switching work would be performed by Anaconda employees. Anaconda employees are represented for collective bargaining purposes by the Mine Mill and Smelter Workers Union.

Following receipt of the March 7, 1958, letter, BA&P employees announced that they would go on strike as of March 14, 1958, because of BA&P's refusal to maintain the *status quo* while the National Mediation Board continued in the performance of its statutory duty of mediating the dispute. The BA&P explained its failure to maintain the *status quo* by asserting that The Anaconda Company, not the BA&P Railway, had control over the work of loading and switching the ore cars in the New Berkeley Yard.

BA&P employees were prevented from striking by a temporary restraining order issued on March 13, 1958, by the Honorable John B. McClernan sitting as Judge of the District Court of the Second Judicial District of the State of Montana In and For the County of Silver Bow. The case was then removed to the United States District Court for the District of Montana, Butte Division, and trial was held on July 16 and 17, 1958.

The District Court handed down an opinion in favor of the defendants on November 4, 1958, and judgment was entered on December 9, 1958, dissolving the temporary

injunction that had been issued by the Montana state court and dismissing the complaint.

The District Court held, *inter alia*, that the act of taking from BA&P employees the work of loading and switching the Anaconda ore cars while the Mediation Board was exercising jurisdiction over the dispute was a violation of the rights given to railway employees by Section 5, First, (a) and (b), and Section 6 of the Railway Labor Act. The District Court further held that The Anaconda Company, through its ownership of and control over the BA&P Railway, had undertaken to accomplish indirectly what the BA&P Railway could not lawfully accomplish directly, consistent with the Railway Labor Act. Hence, the withdrawal of the loading and switching work from BA&P employees while the dispute was the subject of continued efforts at mediation by the National Mediation Board was an unlawful act on the part of The Anaconda Company.

Appeal was taken by the BA&P Railway from the judgment entered by the District Court on December 9, 1958. At the same time a motion was filed by BA&P with the District Court for an injunction to prevent BA&P employees from striking during the appeal. This motion was denied January 15, 1959.

On March 5, 1959, application was made by BA&P to the Court of Appeals for a temporary stay restraining BA&P employees from striking until such time as the Court of Appeals should rule upon another motion by BA&P for an injunction pending appeal. The temporary stay was granted. In the meantime the appellees moved that the Court of Appeals advance the hearing of the appeal on the merits.

On March 10, 1959, the Court of Appeals granted appellant an injunction during the pendency of the appeal,

but the injunction was subject to the condition that on or before March 23, 1959, "appellants shall have made a satisfactory showing to this Court that appellant is ready, willing and able to employ members of appellee unions on a five-man crew basis in conducting switching operations at the Berkeley Yard pending determination of this appeal."

A motion to modify the injunction pending appeal was filed by BA&P on March 17, 1959. This motion was denied on March 31, 1959. At the same time the injunction that had been granted on March 10, 1959, pending appeal was ordered dissolved effective April 6, 1959. The appeal was set for argument on the merits on April 20, 1959.

On April 3, 1959, a second suit was filed in the District Court of the Second Judicial District of the State of Montana In and For the County of Silver Bow, at Butte, Montana. The plaintiffs in this suit were the Butte Miners' Union No. 1 of The International Union of Mine Mill and Smelter Workers and the International Union of Mine Mill and Smelter Workers. The defendant was The Anaconda Company.

The prayer of the complaint in this second suit was that a temporary restraining order and temporary injunction issue to prevent The Anaconda Company from violating an alleged existing agreement with the Mine Mill and Smelter Workers Union by taking from its members the work they were then performing in the ore loading operations and car movements in the New Berkeley Yard, and that this injunction ultimately be made permanent. Simultaneously with the filing of this complaint a temporary restraining order was issued by the Montana state court, the Honorable John B. McClernan sitting as Judge.

This order prohibited The Anaconda Company from discharging members of the plaintiff union and transferring the work of moving and loading ore cars in the New Berkeley Yard to members of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen.

On April 15, 1959, petitioners herein filed in the Court of Appeals a Petition for Permission to File Petition for Writ of Prohibition against John B. McClernan, Judge of the District Court of the Second Judicial District of the State of Montana in and for the County of Silver Bow, with supporting documents. The Anaconda Company and the Mine Mill and Smelter Workers Union were also named respondents in this proceeding. The Petition For Permission to File was granted on April 20, 1959, and an Order to Show Cause was issued to the named respondents on the same day.

By this proceeding the petitioners sought to obtain from the Court of Appeals an order staying the proceedings then pending in the Montana state court, and petitioners also prayed that a writ of prohibition ultimately issue from the Court of Appeals to the Montana state court for the purpose of protecting the appellate jurisdiction of the Court of Appeals in cause No. 16372, and also protecting its power to ultimately require, through its mandate and the process of the District Court, the BA&P Railway and The Anaconda Company to accord to BA&P employees their rights under the Railway Labor Act.

On May 18, 1959, the Court of Appeals rendered its decision in cause No. 16372 affirming the judgment entered by the District Court on December 9, 1958. On the same day the Court of Appeals denied the Brotherhoods' petition for a writ of prohibition in cause No. 16437.

REASONS FOR GRANTING THE WRIT

The Court of Appeals did not hand down an opinion in connection with its denial of the Brotherhoods' petition for a writ of prohibition, and, hence, we cannot be entirely certain of the reason or reasons for the denial. The circumstances under which the writ of prohibition was sought are such, however, that we may be reasonably certain that the strongest motivation of the Court of Appeals in denying the petition was its reluctance to direct a writ of prohibition to a state court, or possibly a belief that it lacked power to direct a writ of prohibition to a state court.

The right of a federal appellate court to protect its appellate jurisdiction by a writ of prohibition directed to a state court has not, to our knowledge, been decided by this Court, and we respectfully submit that the question whether this procedure is proper presents an important federal question which should be settled by this Court.

The circumstances that justify the use of a writ of prohibition in this instance may be summarized as follows:

(1) There exists a direct, patent, and unseemly conflict of authority between the Montana state court at Butte, on the one hand, and the United States District Court for the District of Montana and the United States Court of Appeals for the Ninth Circuit, on the other hand.

The United States District Court's decision, issued November 4, 1958, held that BA&P employees were entitled to continue performing the work of loading and switching the Anaconda ore cars on and after March 14, 1958, during such period as might be needed by the parties in dispute to explore the possibilities of settling their dispute in the manner prescribed by the Railway Labor Act. The responsibility for maintaining the status quo of rules

and working conditions as contained in the collective agreements between the Brotherhoods and the BA&P Railway, as they existed at the inception of this dispute, was declared by the United States District Court to be a duty of The Anaconda Company as well as a duty of the BA&P Railway, owing to the complete control and domination of the BA&P by The Anaconda Company and the singleness of purpose that guides the management of these two corporations. The Anaconda Company was bound as a matter of law to conform to the opinion and judgment rendered by the United States District Court. *Hart Steel Company v. Railroad Supply Company*, 244 U. S. 294.

When the Montana state court at Butte restrained The Anaconda Company, at the instance of the Mine Mill and Smelter Workers, on April 3, 1959, from transferring the work of loading and switching the Anaconda ore cars from members of the Mine Mill and Smelter Workers Union to employees of the BA&P Railway, the order of the Montana state court at Butte conflicted squarely with the duty of The Anaconda Company as announced by the United States District Court in its decision of November 4, 1958. The appellate jurisdiction of the United States Court of Appeals over cause No. 16372, and the process of the District Court which is essential to making the decision of the Court of Appeals effective, will manifestly be nullified and thwarted unless the Montana state court is prohibited from enforcing the restraining order it has directed to The Anaconda Company.

(2) The injunction issued by the Montana state court at Butte on April 3, 1959, makes a mockery of important federal rights given to BA&P employees by Section 2, First and Second; Section 5, First; and Section 6 of the Railway Labor Act, as these rights have been declared by the Dis-

trict Court and by the Court of Appeals for the Ninth Circuit in cause No. 16372.

(3) The All Writs Statute (28 U. S. C. Sec. 1651; formerly Section 262 of the Judicial Code, 36 Stat. Sec. 1162) which authorizes federal appellate courts to issue writs in aid of their appellate jurisdiction contains no language and conveys no inference suggesting that the writ may not be directed to a state court should action by such court threaten to defeat the appellate authority of a federal court or prevent the effectuation of its judgment. The All Writs Statute reads as follows:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (28 U. S. C. Sec. 1651.)

(4) The instant situation is not one in which the petitioners are seeking to use a writ of prohibition to correct jurisdictional or procedural errors committed by a lower court, in lieu of correcting such errors by the process of appeal. This Court has, of course, consistently disapproved attempts to use common law writs as a means of circumventing normal appellate procedure. *Ex Parte Chicago Rock Island & P. Ry. Co.*, 255 U. S. 273; *Ex Parte Bakelite Corp.*, 279 U. S. 438; *Ex Parte Fahey*, 332 U. S. 258; *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379.

In light of the foregoing considerations, we believe the only aspect of this proceeding that is open to debate is the question whether there is some controlling reason why a writ of prohibition may not issue from a federal court to a state court.

This Court does not hesitate to approve use of the writ of injunction to stay proceedings in a state court when

such action is necessary to protect the jurisdiction of a federal court or to assure that its judgment shall be made effective. Such procedure is considered to be entirely consistent with the traditional rule of comity, formalized by former Section 265 of the Judicial Code (36 Stat. 1162) and revised by the Congress in 1948 (now 28 U. S. C. Sec. 2283), to the effect that state and federal courts having concurrent jurisdiction must avoid interference with each other's process. The language of this statute in its present form reads as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The most recent instance known to these petitioners of a decision by this Court approving use of a writ of injunction to stay proceedings in a state court after carefully weighing the 1948 revision of former Section 265 of the Judicial Code is *Capital Service, Inc. v. National Labor Relations Board*, 347 U. S. 501.

In this case Capital Service, Inc., had filed suit for an injunction in a California state court to prevent the picketing of its premises by a union. It also filed with the National Labor Relations Board a charge of unfair labor practices against the same union. The state court issued a preliminary injunction banning all picketing by the union.

The Regional Director of the NLRB issued an unfair labor practice complaint against the union, and then petitioned the Federal District Court for an injunction restraining the picketing until such time as the Board could formally determine the propriety of the picketing in the light of Section 10(1) of the Labor Management Relations Act (29 U. S. C. Section 160(1)).

Simultaneously with the filing of the suit against the union in the District Court, the Board filed another suit in the same District Court against *Capital Service* asking that it be enjoined from enforcing the state court injunction against picketing by the union.

The District Court granted the relief prayed for against Capital Service on the ground that the action of the California state court invaded the exclusive jurisdiction of the National Labor Relations Board over the subject of picketing. The Court of Appeals affirmed the injunction on the same ground. 204 F. 2d 848. This Court granted certiorari. It affirmed the injunction, but not on the ground used by the lower courts. The District Court's injunction staying enforcement of the state court injunction was sustained by this Court solely on the basis of the language in 28 U. S. C. Sec. 2283 (revised Section 265) to the effect that a court of the United States may issue an injunction staying proceedings in a state court "where necessary in aid of its jurisdiction." The reasoning of this Court in affirming the injunction staying proceedings in the state court is explained as follows:

> "The state court injunction restrains conduct which the District Court was asked to enjoin in the Sec. 10(1) proceeding brought in the District Court by the Board's Regional Director against the union. In order to make the Sec. 10(1) power effective the Board must have authority to take all steps necessary to preserve its case. If the state court decree were to stand, the Federal District Court would be limited in the action it might take. If the Federal District Court were to have unfettered power to decide for or against the union, and to write such decree as it deemed necessary in order to effectuate the policies of the Act, it must be freed of all restraints from the other tribunal. To exercise its jurisdiction freely and fully it must first remove the state decree. When it

did so, it acted "where necessary in aid of its jurisdiction."

The circumstances under which it became necessary in the *Capital Service* case to stay proceedings in the California state court in order to protect the jurisdiction of the federal court when enforcing federal rights and federal policy are not distinguishable in any material respect from the circumstances obtaining in the instant litigation wherein the process of the Montana state court threatens the appellate jurisdiction of the Court of Appeals in cause No. 16372 and the power of the federal courts to effectuate the ultimate judgment entered in this cause defining federal rights and federal policy. And whether the stay of proceedings in the instant litigation is accomplished by a writ of prohibition or by a writ of injunction appears to be a purely optional matter.

The similarity of language on this subject as found in the All Writs Act and in revised Section 265 appears significant. In the All Writs Act, courts established by Congress are authorized to use a writ of prohibition "*when necessary * * * in aid of their respective jurisdictions.*" In revised Section 265 a federal court is authorized to stay proceeding in a state court by a writ of injunction "*where necessary in aid of its jurisdiction.*" Moreover, this Court, in *Kline v. Burke Construction Co.*, 260 U. S. 226, declared that these statutes are not to be construed and applied in a divorced and unrelated manner.

> "Section 265 of the Judicial Code provides: 'The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' *But this section is to be construed in connection with Section 262* which authorizes the United States courts 'to issue all writs not specifically provided for by statute, which may be

necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.'" (260 U. S. 226, at 228.) (Emphasis ours.)

Aside from having different origins (Note, 77 *A. L. R.* 245, and 42 *Am. Jur.*, Prohibition, Sec. 3), and there being a difference in the theory of their method of operation—the writ of prohibition is directed to a lower court or quasi-judicial tribunal while the injunction is directed at the parties litigant—the practical effect of the two writs appears to be precisely the same. They both serve to stay proceedings in another court when such proceedings threaten to abort the jurisdiction or process of a federal court.

It appears to these petitioners that the writ of prohibition would have been as appropriate and as effective in the *Capital Service* case as was the writ of injunction. And in the *Capital Service* case, as much as in the instant case, the litigation in the federal court could have been progressed to a conclusion and yet achieved nothing simply because the state court had in the meantime asserted its power over one of the parties to the federal action in such a manner as to make impossible the enforcement of the ultimate decree or judgment entered by the federal courts.

This is the consequence that threatens in the action that is styled *BA&P Ry. v. The Anaconda Company, et al.*, designated cause No. 16372 while in the Court of Appeals, as a result of the denial of the Brotherhoods' petition for a writ of prohibition by the Court of Appeals. We think it important that this Court grant certiorari in this case in order to establish that the procedures authorized by 28 U. S. C. Sec. 1651 and by 28 U. S. C. Sec. 2283 are equally available for protecting the jurisdiction of a Court of Appeals in a proceeding pending before it when such jurisdiction is threatened by process emanating from a state court.

CONCLUSION.

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

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August 15, 1959.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 16437.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Petitioners,

vs.

THE ANACONDA COMPANY, *et al.*,

Respondents.

Excerpt from Proceedings of Monday, May 18, 1959.

Before: BARNES, HAMLEY and JERTBERG, *Circuit Judges.*

ORDER OF SUBMISSION.

ORDERED return to order to show cause argued by Mr. David L. Holland, counsel for the Petitioners, by Mr. Nathan Witt, counsel for Butte Miners' Union No. 1, etc., and by Mr. Lewis Brown, Jr., and Mr. Joseph B. Woodlief, counsel for the Respondents, and submitted to the Court for consideration and decision.

On consideration whereof, IT IS NOW HERE ORDERED that the Petition for Writ of Prohibition, be, and hereby is denied.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,372

May 18, 1959

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Appellant,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Appellees.

Appeal from the United States District Court for the District of Montana

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Before: Barnes, Hamley, and Jertberg, Circuit Judges

HAMLEY, Circuit Judge:

This action was brought by Butte, Anaconda & Pacific Railway Company to enjoin defendant Brotherhoods from calling a strike. The District Court after hearing entered a judgment dismissing the action. The court's findings of fact, conclusions of law, and supporting opinion are reported in 168 F. Supp. 911. Plaintiff appeals.[1]

The principal questions presented here involve aspects of the Railway Labor Act, 45 U.S.C.A., sec. 151 et seq. They are: (1) Whether the controversy was a major or minor dispute under the act; (2) whether the dispute and resultant mediation proceedings had been terminated; and (3) whether during the pendency of the mediation pro-

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[1] Attorneys for The Anaconda Company (Anaconda), International Union of Mine, Mill & Smelter Workers (International Union), and Locals Nos. 1, 16, and 17 of that union, were permitted to appear before this Court as amici curiae.

ceedings appellant failed to preserve the status quo, as required by section 6 of the act, 45 U. S. C. A., sec. 156.

Appellant operates a railroad in Montana, hauling freight as a common carrier engaged in interstate commerce. It is a wholly-owned subsidiary of Anaconda, and both corporations are managed by the same staff of officers from president down to secretary-treasurer. All major policy decisions are made for appellant by officers who are also officers of Anaconda. In making such decisions the controlling consideration is the ultimate effect which the decisions will have on the profits earned by Anaconda.

Anaconda owns and, since 1956, has operated an open pit copper mine at Butte, Montana, known as the Berkeley Pit. Prior to March 14, 1958, the ore from this pit was loaded in appellant's ore cars at a loading yard known as the old Berkeley Yard. The work of switching ore cars in the old Berkeley Yard and between that yard and the West Butte Yard was performed by yard crews of appellant. The men in these crews were members of appellee Brotherhoods, and performed such work pursuant to agreements between the railroad and the Brotherhoods. Under these agreements each yard crew which performed switching service consisted of five men.

Prior to March 14, 1958, a new loading and switching yard, commonly referred to as the new Berkeley Yard, was constructed for Anaconda to serve the Berkeley Pit. Anaconda ascertained that its employees, represented by International Union, were willing to do the switching at the new Berkeley Yard on a three-man-crew basis. It therefore decided to do its own switching when the new Berkeley Yard was put in operation. However, the then manager of appellant obtained permission from Anaconda to ex-

plore the possibility of having the switching done by the railroad's employees on as economical a basis as it could be done by Anaconda. If this were found to be possible, then Anaconda would continue to contract this switching to appellant as it was then doing at the old Berkeley Yard.

With this purpose in mind, appellant on September 27, 1957, served upon appellee Brotherhoods a so-called section 6 notice under the Railway Labor Act.* In this notice appellant proposed an amendment of the existing agreements between it and the Brotherhoods to permit the loading of ore in the new Berkeley Yard with main line crews instead of yard crews. Appellee Brotherhoods rejected this proposal. Appellant then served another section 6 notice in which it was proposed that the existing agreements be amended to provide that the yard crews in the new Berkeley Yard consist of three men rather than five men.

Appellee Brotherhoods declined to agree to such an amendment. On October 25, 1957, they invoked the media-

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* Section 6 of the act, 45 U.S.C.A., sec. 156, reads as follows:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice: In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

tion services of the National Mediation Board. The Board docketed this dispute as Mediation Case No. A-5623. A mediator was assigned to the case by the Board and a conference of the parties under the sponsorship of the mediator was held on January 15, 1958. The Brotherhoods there indicated their continued unwillingness to accept either of the contract amendments proposed by appellant. The railroad then informed the Brotherhoods that when the new Berkeley Yard was put into operation the switching would be done by employees of Anaconda.

On January 17, 1958, appellant notified the mediator and the Brotherhoods that it was withdrawing the section 6 notices, with the intention thereby of terminating the mediation proceedings. The Brotherhoods, however, took the position that in view of appellant's announcement that Anaconda would do the switching at the new Berkeley Yard a dispute necessitating mediation continued. The Board decided to resume active mediation and advised the parties that conferences would begin on March 5, 1958. No progress was made at these conferences.

On March 7, 1958, appellant advised the Brotherhoods that the loading of ore cars in the new Berkeley Yard would commence shortly. The Brotherhoods were further advised that appellant did not consider the "status quo" provision of the Railway Labor Act as applicable to the contemplated discontinuance of switching service by appellant.[3]

Under the plan for service in and to the new Berkeley Yard developed by appellant and Anaconda, appellant's trains would use Northern Pacific Railroad Company tracks between Durant, Montana, and the new yard. Seek-

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[3] The so-called "status quo" provision is contained in the second sentence of section 6, quoted in footnote 2.

ing to take advantage of this fact as a basis for bargaining, the Brotherhoods on March 8, 1958, submitted to appellant a proposed agreement. Under this proposal appellant would be required to pay substantial additional compensation to its railroad employees because of its use of Northern Pacific tracks. It was proposed that the agreement would become effective when Anaconda employees took over the switching at the new Berkeley Yard. It would continue until such switching was returned to appellant's employees represented by the Brotherhoods.[1] Neither the Brotherhoods nor appellant gave a section 6 notice in connection with this proposed agreement.

Appellant apparently rejected the proposed agreement. On March 11, 1958, the Brotherhoods notified appellant that the latter's employees represented by the Brotherhoods would strike on March 14, 1958.[2] On March 13, 1958, appellant sent a telegram to the National Railroad Adjustment Board calling attention to the Brotherhoods' proposal of March 8, 1958. Asserting that the latter were seeking "to impose severe penalties upon carrier," appellant asked the Adjustment Board to "accept jurisdiction and docket." On the following day the Adjustment Board advised appellant by telegram that jurisdiction could not be accepted on the basis of appellant's telegram. It would be necessary, appellant was advised, to submit the matter "in accordance with circulars one B and C." The record does not indicate that appellant thereafter

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[1] It is recited in this proposed agreement that the agreement does not dispose of, set aside, or prejudice the position of the Brotherhoods that appellant was not entitled to turn over the switching work at the new Berkeley Yard to Anaconda.

[2] The reasons given in this strike notice were "* * * the carrier's refusal to negotiate matters in dispute over change of operations and, failing to hold matters which are in dispute, status quo, pending mediation proceedings."

perfected its submission of this matter to the Adjustment Board.*

On March 13, 1958, which was the same day that appellant sent its telegram to the Adjustment Board, appellant instituted this action for injunctive relief. The suit was commenced in the District Court of the Second Judicial District of Montana, in and for the County of Silver Bow. A temporary restraining order was immediately issued by the state court enjoining the Brotherhoods from carrying out their strike threat. Upon being advised of this development, the mediator ceased his efforts at mediation. However, the files in the matter before the Mediation Board remained open.

The cause was thereafter removed to the United States District Court, District of Montana, Butte Division, because of the presence of a federal question. See 28 U. S. C. A., sec. 1331.

In dismissing the action the District Court held in effect that (1) the dispute which led to the strike threat was a "major dispute" within the meaning of the Railway Labor Act and as such had been submitted to the National Mediation Board under section 6 of that act (45 U. S. C. A., sec. 156); (2) appellant could not legally have reduced the number of employees per switching crew from five to three while the section 6 procedure was pending, in view of the status quo provision of that section; (3) the status quo provision was circumvented and there was accomplished indirectly what could not be accomplished directly by the act of the parent corporation, Anaconda, in taking over the switching work and employing its own

* In June 1958, following the commencement of this action, appellant submitted to the Adjustment Board certain time claims filed by the Brotherhoods, none of which brought into question the dispute which led to the strike threat.

employees on a three-man-crew basis; and (4) a court of equity "will not lend its weight to such purpose by making permanent the temporary restraining order heretofore issued."[1]

Appellant contends that although a section 6 "major dispute" had been in existence it came to an end when the Brotherhoods rejected appellant's proposal, the latter withdrew its section 6 notices, and Anaconda took over the switching operation. Thereafter, appellant argues, any controversy that remained was either a so-called "minor dispute" concerning which a strike is unlawful, or was no labor dispute at all, thus escaping the sanctions of the Norris-LaGuardia Act.[2] In the latter event, or even if the controversy be regarded as a major dispute, appellant urges, injunctive relief should have been granted. The district court's view that such relief should be denied because appellant did not preserve the status quo is challenged. According to appellant, such a conclusion is possible only if the corporate identity of Anaconda is ignored, and this should not be done.

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[1] The judgment of the District Court here under review dissolved the temporary restraining order and, as before noted dismissed the action. This Court initially enjoined the strike pending disposition of the appeal, subject to certain conditions. The conditions were not fulfilled and on March 31, 1959, the injunction was dissolved, effective April 6, 1959. No injunction has been in effect since the latter date. We are advised that no strike has been called since dissolution of the injunction. This may be due to the pendency of an action in the District Court of the Second Judicial District of Montana in and for the County of Silver Bow. In the latter action, commenced on April 3, 1959, the International Union and one of its locals seek to enjoin Anaconda from returning the switching work at the new Berkeley Yard to railroad employees represented by the Brotherhoods. A temporary restraining order has been granted in that state action. Appellee Brotherhoods have applied to this Court for a writ of prohibition to bring these state court proceedings to a halt pending disposition of this appeal, Brotherhood of Locomotive Firemen and Enginemen v. The Anaconda Company No. 16437.

[2] 47 Stat. 70, as amended, 29 U.S.C.A., secs. 101-115.

At the outset it is necessary to note the distinction between so-called major and minor disputes under the Railway Labor Act. In *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U. S. 711, 723, the difference between these two kinds of dispute was explained as follows:

> "The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one independent of those covered by the collective agreement. * * *"

As to both kinds of dispute, the act requires that the parties enter into negotiation as the first step towards settlement of the controversy. Where negotiation fails, the procedures diverge. Major disputes go first to mediation before the National Mediation Board; if that fails, then to acceptance or rejection of arbitration; and finally to possible presidential intervention. If all this fails, compulsory processes are at an end, and either party may resort to self-help. *Elgin, Joliet & Eastern Railway Co. v. Burley, supra*, page 725. The Norris-LaGuardia Act prohibits the issuance of an injunction in a railway labor case involving

a "major dispute." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U. S. 30, 42.

In the case of minor disputes, if negotiation fails either party may submit the matter to the appropriate division of the National Railroad Adjustment Board. The awards of the several divisions of the Adjustment Board are final and binding. Neither party is permitted to resort to self-help. A strike involving a so-called minor dispute is therefore to be enjoined. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., supra*

As before noted, appellant concedes that a section 6 major dispute was at one time in existence between these parties. Regardless of the concession, however, there could be no question as to this, since appellant itself gave the section 6 notices. The dispute, which was later submitted to mediation, related to "working conditions," i.e., whether a road crew or a yard crew should do certain switching, and, if a yard crew, how many men would be in the crew. Appellant specifically requested a change in existing agreements concerning these matters. No question was involved as to the interpretation of existing agreements.

Appellant contends, however, that the major dispute involving these matters came to an end when the Brotherhoods rejected appellant's proposals, the latter withdrew its section 6 notices, and Anaconda took over the switching operations at the new Berkeley Yard.

The action of the Brotherhoods in rejecting appellant's proposals did not serve to terminate the mediation proceeding. Under section 5 of the act, 45 U. S. C. A., sec. 155, several other steps remained to be taken.[*] Likewise,

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[*] "The next step was for the Mediation Board to endeavor to induce the parties to submit their controversy to arbitration. If

(Continued on following page)

the action of appellant in withdrawing its section 6 notices did not terminate the proceeding. The provisions of section 5 referred to in footnote 9 make it clear that the parties to a dispute under mediation may not unilaterally terminate the proceeding, but are required to follow each procedural step specified in the statute.

If the major dispute was terminated, therefore, it must have been for the reason that after the Brotherhoods rejected appellant's proposals Anaconda took over the switching operation at the new Berkeley Yard. Appellant asserts that when this occurred the subject matter of the dispute disappeared. Since employees represented by the Brotherhoods would not be doing the switching, the argument goes, any question of changing the Brotherhood agreements with regard to such switching operations was rendered moot.

It may be assumed, for present purposes, that where an independent shipper, not acting in concert with a carrier, determines to perform its own switching service on its own property; section 6 mediation proceedings involving a dispute relative to such service are necessarily terminated.

Here, however, the carrier is the wholly-owned subsidiary of the shipper—Anaconda. The two have common principal officers and the unified purpose of serving the ultimate best interests of the shipper. Under these circumstances the act of Anaconda in taking over the switching service, to be performed by employees represented by

(Continued from preceding page.)

either party had refused to arbitrate, the Board would then have been required to notify the parties in writing that its mediatory efforts had failed. After this had been done, no change could have been made in the rate of pay, rules, working conditions, or established practices for a period of thirty days unless in the intervening period the parties had agreed to arbitration, or an emergency board had been created under section 10, 45 U.S.C.A., sec. 160.

another union, must be regarded as the act of the carrier. Otherwise, a carrier by interrelation with its shippers would always have it within its power to circumvent the mediation provision of the Railway Labor Act.

The circumstances of this case are particularly aggravated. With the necessary acquiescence, if not upon the direction, of its parent corporation, appellant gave the section 6 notices. The Brotherhoods and the Mediation Board were entitled to assume that this was a bona fide attempt to invoke the provisions of the act relating to major disputes. As events turned out, it was not, since appellant was not content or able to participate in the proceedings as an independent carrier. On the contrary, it always had it within its power, or so it thought, to terminate the proceeding through action by Anaconda.

We therefore conclude that the major dispute between appellant and the Brotherhoods concerning contract provisions applicable to switching at the new Berkeley Yard still exists. Likewise, the mediation proceedings instituted by appellant in an effort to resolve that dispute are still pending.

Appellant argues that even if this is so, the injunction should have been granted. This contention is based on the premise that the dispute is something different from what it started out to be. Appellant asserts that the dispute which now exists is whether the men represented by appellees are to be allowed to do the work at all.

But this view must necessarily be rejected in the light of what has already been said. The nature of the dispute has not been changed unless the action of Anaconda in taking over the switching operation can be regarded as that of an independent shipper not acting in concert with its carrier. It has been shown that this is not the case and that what Anaconda has done must be regarded as the act

of the carrier. The dispute thus remains the same as when the section 6 notices were given.

On similar reasoning we agree with the conclusion of the district court that appellant has not maintained the status quo pending completion of the mediation proceedings, as required by section 6 of the act. This alone is enough to warrant dismissal of appellant's action for injunctive relief unless the decree sought to be entered would also require restoration of the status quo. Neither party has asked for the latter relief.

Injunctive relief may be utilized by either party to vindicate the processes of the Railway Labor Act. *Virginia R. Co. v. System Federation No. 40,* 300 U. S. 515. But here appellant does not seek an injunction to compel utilization of Railway Labor Act procedures. Rather it wants to enjoin employees from resorting to self-help after appellant itself (through Anaconda) abandoned those procedures. In addition to the reasons given by the district court for denying such relief, it was also necessarily denied for the reason that appellant had not exhausted its administrative remedies.[10]

Appellant also argues that the controversy is not a "labor dispute" within the meaning of the Norris-LaGuardia Act, and that the sanctions of that act are therefore inapplicable. Again, however, this contention is predicated upon the view that the initial dispute came to an end when Anaconda decided to take over the switching operation at the new Berkeley Yard. This, as we have decided, is not true.

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[10] Section 8 of the Norris-LaGuardia Act, footnote 8, supra, 29 U.S.C.A., sec. 108. It may be noted that if this had been found to be a minor dispute instead of a major dispute an injunction could not have been obtained, because the dispute was not submitted to the National Railroad Adjustment Board. See Manion v. Kansas City Terminal Railway Co., 353 U. S. 927.

There are certain decisions which a carrier may make which cannot give rise to "labor disputes" within the meaning of the Norris-LaGuardia Act.[11] But we have concluded that the controversy which resulted in the strike threat in the matter before us was a major dispute within the meaning of the Railway Labor Act. It was therefore a "labor dispute" within the meaning of the Norris-LaGuardia Act. In any event, the latter act stands in the way of granting injunctions under certain circumstances. It provides no basis for the granting of an injunction."

Affirmed.

(Endorsed:) Opinion. Filed May 18, 1959.

Paul P. O'Brien, Clerk.

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[11] See Brotherhood of Railroad Trainmen v. New York Central Railroad Co., 6 Cir., 246 F. 2d 114; Chicago and North Western Railway Co. v. Order of Railroad Telegraphers, 7 Cir., F. 2d , decided March 13, 1959.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA,
BUTTE DIVISION.

No. 633.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Defendants.

MEMORANDUM.

Stripped of all the foliage, the issues presented by this case boil down to these:

1. Is the dispute between the plaintiff and the defendants a so-called "major dispute" to be processed under Section 6 of the Railway Labor Act (Section 156, Title 45, U. S. C.), or is it a "minor dispute" to be processed under Section 3 of the Railway Labor Act (Section 153, Title 45, U. S. C.)?

2. If, as the Court finds, such dispute is a major dispute, has the status quo provision of Section 6 of the Act been violated?

3. If the status quo provision of the Act has been violated, whether a Court of equity should grant an injunction in favor of a party to such violation?

The Railway Labor Act places the duty on carriers and their employees to exert every reasonable effort to settle all disputes between themselves and provides machinery and procedures for such settlement. Under the Act disputes are divided into two classes, so-called minor disputes and so-called major disputes. In both disputes, the parties are required to exert every effort to settle the dispute between themselves, but in the event the dispute remains unresolved after such efforts, in the case of a minor dispute it goes to the National Railroad Adjustment Board (Section 153, Title 45, U. S. C.), and after the procedures followed in the Act have been pursued, the National Adjustment Board will make an award which is binding on both parties. In the case of so-called major disputes remaining unresolved between the parties, either party may request the service of the Mediation Board (Section 156, Title 45, U. S. C.) and the dispute then goes through the procedures set up by the Act. In this case the difference between major and minor disputes is important for several reasons. In case of a minor dispute, referred to and under the jurisdiction of the Adjustment Board, a strike can never be legal, the award of the Board being final and binding upon the parties, whereas in the case of a major dispute the Mediation Board makes no award and after the procedures set up in the Act have been followed, a strike may be legal. The plaintiff in this case started out following the procedures outlined for a major dispute, but then attempted to withdraw the Section 6 Notices which it had served and although the Mediation Board did not close the file on the dispute, the plaintiff then brought the case before the Adjustment Board.

The difference between the so-called major and minor disputes was pointed out by the Supreme Court in *Elgin*

J. & E. R. Co. v. Burley, 325 U. S. 711. The Supreme Court, at page 723, said:

> "The first (major dispute) relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or *where it is sought to change the terms of one*, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
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> "The second class (minor dispute) however, contemplates the existence of a collective agreement already concluded or, *at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one.*"

It seems clear from the record in this case that the dispute between the parties arose out of the attempt by the plaintiff to secure the amendment of the existing agreements with the defendant Brotherhoods to permit either the handling of loading operations by main line crews or to reduce the personnel of the yard crews from five persons to three persons. This dispute comes within the above quoted definition of a major dispute. Certainly there is no dispute over the terms or meanings of the existing agreements, but rather an attempt to amend the terms of the existing agreements.

Involving as it did an attempt to amend the existing agreements, the dispute between the plaintiff Railway Company and the defendant Brotherhoods was a major dispute to be handled in accordance with Section 6 of the Railway Labor Act (Section 156, Title 45, U. S. C.). That section, after providing that notice be given by either the carrier or representatives of the employees on intended change in an agreement affecting rates of pay, rules or

working conditions and for the arranging of conferences between the parties, further provides:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

The plaintiff Railway Company, as pointed out, initiated proceedings under this Section by serving so-called Section 6 notices, seeking to modify or amend the existing agreements to permit the loading of Berkeley Pit ore from the new Berkeley Yard either by main line crews or with a three man yard crew rather than a five man yard crew. When no agreement was reached in the conference between the Railway Company and the Brotherhoods, the latter invoked the services of the Mediation Board under the Act, and a mediator was assigned to the case. Thereafter, when no agreement was reached after conferences between the mediator and the parties, the Railway Company attempted to withdraw the Section 6 notices. However, the Brotherhoods protested the withdrawal of the Section 6 notices and the Mediation Board remained in the case and a mediator assigned to the case was present in Anaconda, Montana, when the work in the new Berkeley Yard was taken away from the Brotherhoods and given to another craft, the Brotherhoods served their strike notice, and the temporary restraining order enjoining such strike

was issued. As soon as the temporary restraining order was issued, the mediator assigned to the case left the scene, but the file in the matter before the Mediation Board remained open at the time of the hearing in this court.

In view of the above quoted provision of Section 6 of the Railway Labor Act, it is clear that the plaintiff railway company could not on its own have made the change from a five man crew to a three man crew, as was done, without violating that provision of the Act, because at the time the change was made the matter was still before the Mediation Board and a mediator was at the scene attempting to settle the dispute.

However, the Railway Company takes the position that the matter of making the change was out of its hands; that the new Berkeley Yard was an industrial yard of The Anaconda Company, and that the latter company had sole control over which craft would do the loading and switching work in the new yard and how many men would be employed in doing that work. That position might be perfectly valid in a case where the concern owning the industrial yard was unrelated to the carrier, but it has no validity in this case. Here the evidence discloses that to all intents and purposes and in every way except as to form, The Anaconda Company and the plaintiff Railway Company constituted but a single entity in their dealings with the defendant Brotherhoods concerning the loading of ore in the new Berkeley Pit. The Anaconda Company completely controls the Butte, Anaconda & Pacific Railway Company; the same person in one capacity or the other made all the decisions involved in this dispute and those decisions were made with the ultimate good of The Anaconda Company in view, and without regard to the obligations imposed on the carrier by its collective agreements

and by the Railway Labor Act. It is crystal clear from the evidence that had the Brotherhoods acceded to the demands of the carrier for changes in the collective agreements members of the defendant Brotherhoods in the employ of the plaintiff Butte, Anaconda & Pacific Railway Company would have been allowed to do the loading and switching work in the new Berkeley Yard.

13 *Am. Jur.*, Sec. 7, page 16, has this to say concerning the disregarding of corporate entity:

> "The doctrine that a corporation is a legal entity existing separate and apart from the persons composing it is a legal theory introduced for purposes of convenience and to subserve the ends of justice. *The concept cannot, therefore, be extended to a point beyond its reason and policy, and when invoked in support of an end subversive of this policy, will be disregarded by the courts.* Thus, in an appropriate case and in furtherance of the ends of justice, a corporation and the individual or individuals owning all its stock and assets will be treated as identical, the corporate entity being disregarded where used as a cloak or cover for fraud or illegality."

Ballentine on Corporations, pages 313-314, quoted in plaintiff's brief, has this to say concerning the subject:

> "*But after all it comes down to a question either of agency or of good faith, honesty and fairness in the use of the corporate privilege for legitimate ends.* If a corporation is controlled by another and is manipulated by the parent for its own purposes and in its own interests to the prejudice of innocent third parties, or the public welfare, it may be necessary to hold the controlling party responsible."

A statement that is particularly appropriate to this case and applicable to the third issue mentioned at the beginning of this memorandum is found in the case of

Home F. Ins. Co. v. Barber, 67 Neb. 644, 93 NW 1024, 60 LRA 927, 108 Am. St. Rep. 716 as quoted in 13 *Am. Jur.*, page 161, as follows:

> "Where a corporation is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf, and for their advantage, the corporation will not be permitted to recover."

By this memorandum the Court does not mean to infer that there is any fraudulent or illegal purpose in the ownership and control of the Butte, Anaconda & Pacific Railway Company by The Anaconda Company. On the contrary, it is a perfectly legitimate arrangement, which no doubt contributes generally to the welfare of both corporations and to the welfare of the community generally. All that is meant to be said is that such ownership and control of the Railway Company in this case was used to accomplish by indirection an end which the plaintiff Railway Company could not accomplish directly without violating the Railway Labor Act. Under such circumstances, this Court, sitting as a court of equity, will not lend its weight to such purpose by making permanent the temporary restraining order heretofore issued.

Dated this 4th day of November, 1958.

W. D. MURRAY,
United States District Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA,
BUTTE DIVISION.

No. 633.

BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause came on regularly to be heard on the 16th and 17th days of July, 1958, plaintiff appearing by and through its attorneys of record, P. L. MacDonald and R. Lewis Brown, Jr., and defendants appearing by and through their attorneys of record David L. Holland and Harold C. Heiss.

Evidence, both oral and documentary, was submitted and received, and the Court now being fully advised in the premises from the legal evidence introduced, the stipulations of the parties, the admissions in the pleadings, and the legal arguments, makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT.

I.

That plaintiff is a railroad corporation duly organized and existing under the laws of the State of Montana, and as such operates a railroad in said State, hauling freight as a common carrier for hire and engaging in interstate commerce; that the Brotherhood of Locomotive Firemen and Enginemen is an unincorporated association of persons acting as a collective bargaining agent and the duly authorized representative of plaintiff's employees engaged in serving the plaintiff as engineers, helpers, firemen, motormen, hostlers and hostler helpers; that the defendant Frank W. Glass is an officer of said association, to-wit: an Alternate Vice President; that the defendant J. H. McCarvel is a local officer of said association, to-wit: its General Chairman on the plaintiff railway; that the defendant Brotherhood of Railroad Trainmen is an unincorporated association of persons acting as collective bargaining agent and the duly authorized representative of plaintiff's employees engaged in serving the plaintiff as conductors and brakemen; that the defendant H. F. Nevala is an officer of said association, to-wit: its Deputy President; that the defendant R. R. McLean is a local officer of said association, to-wit: its General Chairman on the plaintiff railway; that this is an action arising under the laws of the United States regulating commerce between the States; that the amount in controversy exceeds the sum of Three Thousand and no/100 Dollars ($3,000.00), exclusive of costs and interest.

II.

That plaintiff, Butte, Anaconda & Pacific Railway Company is a wholly owned subsidiary of The Anaconda Company, both corporations are managed by the same staff of officers from the President down to and including the Secretary-Treasurer. All major policy decisions for the plaintiff, including those involving labor relations are made for it by its officers, who are also officers of The Anaconda Company, and in making such decisions the controlling consideration is the ultimate effect which the decisions will have on the profits earned by The Anaconda Company.

III.

That The Anaconda Company has owned and operated an open pit copper mine at Butte, Montana, known as the Berkeley Pit since some time in 1956; that prior to March 14, 1958, the ores mined at said Berkeley Pit were loaded in plaintiff's ore cars at a loading yard near the said Berkeley Pit known as the old Berkeley Yard; that the work of loading and switching the ore cars in the old Berkeley Yard and between said Berkeley Yard and the West Butte Yard of the plaintiff was, prior to said March 14, 1958, performed by yard crews of the plaintiff, who were members of the defendant Brotherhoods, under the agreements hereinafter referred to; that the said ore cars, when loaded and assembled in the West Butte Yard by the yard crews of the plaintiff as aforesaid, were picked up at the West Butte Yard and moved to The Anaconda Company's smelter at Anaconda, Montana, by the main line crews of the plaintiff, who were also members of the defendant Brotherhoods.

IV.

That at all times material to this action there were collective agreements entered into by and between the plaintiff and the defendants, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railroad Trainmen, which agreements established the rates of pay, rules and working conditions for plaintiff's employees engaged in engine and train service and switching service; that under said agreements loading and switching of cars within a yard was to be performed by yard crews as distinguished from main line crews which handled trains outside of yards and on the main line of the plaintiff; that under said agreements said yard crews consisted of five men, to-wit: an engineer, fireman, conductor and two brakemen, and such was the make-up of the yard crews which prior to March 14, 1958, had been engaged in the work of loading and switching the cars in the old Berkeley Yard and moving the same to the West Butte Yard of the plaintiff.

V.

That prior to March 14, 1958, a new loading and switching yard commonly referred to as the new Berkeley Yard located approximately 3,000 feet from the old Berkeley Yard was constructed by the plaintiff for The Anaconda Company, the cost thereof being borne by The Anaconda Company, and said yard was completed and ready for operation on March 14, 1958. That said new Berkeley Yard does not connect with either the West Butte Yard of the plaintiff or directly with the main line tracks of plaintiff, but trains of ore cars from the new Berkeley Yard are moved over 14 miles of Northern Pacific tracks to Durant, Montana, and thence on to and

over the main line of the plaintiff to the smelter at Anaconda, Montana.

VI.

That on or about September 27, 1957, in contemplation of the completion and putting in operation of the new Berkeley Yard, the plaintiff served upon the defendant Brotherhoods a Section 6 notice under the Railway Labor Act, as amended, proposing an amendment of the aforesaid collective agreements to permit the loading of ore in the new Berkeley Yard with main line crews of the plaintiff rather than yard crews; that thereafter when the said Brotherhoods rejected said proposed amendment, the plaintiff served a second Section 6 notice under the Railway Labor Act, in which it was proposed that the existing agreements be amended to provide that the yard crews in the new Berkeley Yard consist of three men rather than five men, as provided in the existing agreements; that plaintiff offered to the defendant Brotherhoods and their members the work of loading ores in the new Berkeley Yard if the Brotherhoods would consent to the amendment of the existing agreements in either of the aspects proposed by the said Section 6 notices, but the Brotherhoods declined to agree to the amendment of the existing agreements in either respect.

VII.

That after the plaintiff and the defendant Brotherhoods failed to agree on the changes in the agreements proposed by the aforesaid two Section 6 notices, and on or about October 25, 1957, the defendant Brotherhoods invoked the mediation services of the National Mediation Board and the dispute between the Brotherhoods and the

plaintiff, arising under the two Section 6 notices, was docketed by the Board as Mediation Case No. A-5623; a mediator was assigned to the case by the Board and a conference of the parties under the sponsorship of the mediator was held on January 15, 1958. The Brotherhoods continued to be unwilling to agree to the use of main line crews for switching operations or to the use of three-man switching crews. That then plaintiff informed the Brotherhoods that when the work of loading and switching the ore cars was tranferred to the new Berkeley Yard, the work would be taken from the plaintiff's employees and would be performed by employees of The Anaconda Company.

VIII.

By letter dated January 17, 1958, the plaintiff notified the mediator and the defendant Brotherhoods that it was withdrawing the Section 6 notices that led to the dispute docketed as Mediation Case No. A-5623, with the understanding that this withdrawal would terminate the mediation proceedings. The Brotherhoods nevertheless maintained to the mediation Board that a dispute necessitating mediation continued because of the plaintiff's announcement on January 15 that its employees would cease performing the loading and switching of Anaconda ore cars on the day that the new Berkeley yard was ready for operation. The Board decided to resume active mediation of the dispute and accordingly advised the parties that conferences would begin on March 5th in Anaconda, Montana; the plaintiff challenged the Board's authority to resume mediation, refused to participate in conferences with the Brotherhoods, and disregarded the Board's request that it withhold making effective the proposed change in

the manner of handling, by plaintiff's yard crews, the loading and switching of the ore cars so as to not provoke a strike by plaintiff's employees.

IX.

By letter dated March 7, 1958, plaintiff advised the Brotherhoods that the loading of ore cars in the new Berkeley Yard would commence shortly; that plaintiff's main line crews would move the trains of ore cars from the new Berkeley Yard over Northern Pacific tracks to Durant and on to Anaconda, and that the plaintiff did not consider the "status quo provisions" of the Railway Labor Act applicable to the contemplated change in the manner of loading and switching Anaconda ore cars. The plaintiff's employees held 15 regular switch-crew jobs and three loading jobs known as a "car dropper," when the loading of Anaconda ore cars in the old Berkeley Yard ceased on March 13, 1958.

X.

The Brotherhoods representing plaintiff's employees announced on March 11, 1958, that the employees would strike on March 14 because of the plaintiff's refusal to hold matters in dispute in status quo while the mediation proceedings were pending, as required by Section 6 of the Act (Section 156, Title 45, U. S. C.). On March 13, 1958, plaintiff obtained a temporary restraining order from the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, enjoining plaintiff's employees from carrying out their threat to strike, and said cause was removed to this court and a hearing was had on whether the temporary restraining order should be made permanent. The mediator ceased

his efforts at mediation when advised on March 13, 1958, that the employees were enjoined from striking.

XI.

That the work of loading and switching in the new Berkeley Yard is not materially different from the work in the old Berkeley Yard; that the decision as to what employees were to be given the work in the new Berkeley Yard was one to be made by C. H. Steele, who was and is the officer in charge of operations of the Butte, Anaconda & Pacific Railway and also in charge of the Western operations of The Anaconda Company; that if the defendant Brotherhoods had yielded to the request of plaintiff that the collective agreements be modified to provide for a three-man crew in the new Berkeley Yard rather than a five-man crew, the work in the new Berkeley Yard would have been given to the Brotherhoods.

XII.

That in dealing with the Brotherhoods in this instance, The Anaconda Company and Butte, Anaconda & Pacific Railway Company were to all intents and purposes, one employer and the separate corporate entities of the two corporations were used to evade the status quo provisions of the Railway Labor Act.

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW.

I.

That this Court has jurisdiction of the parties and the subject matter of this action.

II.

That the plaintiff is a common carrier engaged in interstate commerce and operates subject to the Federal Railway Labor Act.

III.

That the dispute which led to the instant suit is primarily concerned with the amendment of the existing agreements between the plaintiff and the defendant Brotherhoods in the manner proposed by the two Section 6 notices abover referred to, and as such is a "major dispute" subject to the mediatory jurisdiction of the National Mediation Board and mediation of the dispute was necessarily suspended by the Board pending the disposition of this action.

IV.

That under the terms of Section 6 of the Railway Labor Act (Section 156, Title 45, U. S. C.) the plaintiff in this case could not legally have reduced the number of employees in a yard crew from five to three while the Section 6 notice requesting such change was before the Mediation Board; that by virtue of the complete control by The Anaconda Company of the plaintiff Butte, Anaconda & Pacific Railway Company, said companies have accomplished indirectly what the plaintiff company could not have done directly without violating the status quo provision of Section 6 of the Railway Labor Act; that

under these circumstances the plaintiff is not entitled to invoke the aid of a court of equity.

V.

That the temporary restraining order heretofore issued in this cause by the District Court of the Second Judicial Dictrict of the State of Montana, in and for the County of Silver Bow, on the 13th day of March, 1958, be dissolved.

Let counsel for defendants submit a draft of judgment in accordance with Rule 11(b) of the Rules of the District Court.

Done and dated this 4th day of November, 1958.

W. D. MURRAY,
United States District Judge.

ALL WRITS ACT

28 U. S. C. Sec. 1651.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

THE RAILWAY LABOR ACT

Being an act to provide for the prompt disposition of disputes between carriers and their employees and for other purposes

(U. S. Code, Title 45, Chapter 8)[1]

* * * * *

GENERAL DUTIES.

SECTION 2,

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second: All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

* * * * *

"FUNCTIONS OF MEDIATION BOARD

"SEC. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 10 of this Act, no change shall be made in the rates of pay, rules, or

working conditions or established practices in effect prior to the time the dispute arose.

* * * * *

"SEC. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

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FILED
SEP 8 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 298

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Petitioners,

v.

THE ANACONDA COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS AND BUTTE MINERS' UNION NO. 1 OF THE INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS IN OPPOSITION

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Opinions Below

The Court of Appeals denied the petition for a writ of prohibition without written opinion (Pet. 18).

Jurisdiction

The judgment of the Court of Appeals was entered on May 18, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether the Court of Appeals properly denied a petition for a writ of prohibition to a Montana state court to prevent that court from enforcing a restraining order when that court had jurisdiction, the petitioners had an adequate remedy in that court, and when the restraining order in no way interfered with the appellate jurisdiction of the Court of Appeals in a matter then pending in that court.

Statutes Involved

The All Writs Act, 28 U. S. C. Sec. 1651, and the pertinent provisions of the Railway Labor Act, U. S. Code, Title 45, Chapter 8, are set forth in the Appendix to the Petition, pp. 49-51.

Statement

The statement contained in the Petition (pp. 3-9) sets forth the facts material to the consideration of the question presented.

Argument

No contention is made in the Petition that the Montana State District Court did not have jurisdiction to issue the restraining order against The Anaconda Company on the complaint of the International Union of Mine, Mill and Smelter Workers and Butte Miners' Union No. 1 of that International Union (Pet. 8-9). It has long been settled that a writ of prohibition does not lie to a court which has jurisdiction. *In re Rice*, 155 U. S. 396; *Ex Parte Bakelite Corporation*, 279 U. S. 438, 461.

Even if the Montana State Court had no jurisdiction, neither prohibition nor any other extraordinary writ will issue if the petitioner has another remedy. *Ex Parte*

Fahey, 332 U. S. 258; *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379. On the face of the matter, intervention in the Montana proceeding was available to petitioners.

In any event, there was actually no conflict between the proceeding in the Court of Appeals (Pet. 7-8) and the proceeding in the Montana State Court and therefore there was no need for the Court of Appeals to issue a writ of prohibition or any other extraordinary writ in aid of its jurisdiction. The only question before the Court of Appeals was whether to affirm the judgment of the District Court for the District of Montana dismissing the action for an injunction against a strike by petitioners. It is difficult to understand how the proceeding in the Montana State Court or that court's restraining order could interfere in any way with whatever the Court of Appeals did. And now that the Court of Appeals has affirmed the judgment of the District Court, the petition for a writ of prohibition would seem to be moot.

Capital Service, Inc. v. *National Labor Relations Board*, 347 U. S. 501, upon which petitioners rely so heavily (pp. 13-16), is clearly distinguishable, aside from the fact that the case concerned a writ of injunction and not a writ of prohibition. In the *Capital Service* case, there was a clear conflict between the exclusive jurisdiction which Congress had vested in the Labor Board and the jurisdiction which the California State court had assumed to issue an injunction.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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